

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

NATURAL RESOURCES DEFENSE	)	
COUNCIL, INC.	)	
Plaintiff,	)	
	)	
v.	)	17 Civ. 3519 (LAK)
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Defendant.	)	
	)	

**DECLARATION OF BRIAN HOPE**

I, BRIAN HOPE, declare that the following statements are true and correct to the best of my knowledge and are based on my own personal knowledge, on information contained in the records of the United States Environmental Protection Agency (“EPA”), or on information supplied to me by employees under my supervision or employees in other EPA offices.

1. I am the Deputy Director of the Office of Executive Secretariat (“OEX”) within the Office of the Administrator of the U.S. Environmental Protection Agency (“EPA” or “Agency”). I have held this position since June 2006. My office handles four business lines: overseeing Freedom of Information Act (“FOIA”) request processing in the Office of the Administrator; managing the records management program for the Office of the Administrator; managing the Administrator’s and Deputy Administrator’s executive correspondence; and administering the EPA’s electronic correspondence tracking system.

2. I am personally familiar with Plaintiff’s April 3, 2017 FOIA request (“April 3 FOIA request”) (Exhibit A), which is one of four FOIA requests at issue in this case and which is

the subject of Plaintiff's September 22, 2017 Motion for a FOIA Production Deadline. As the Deputy Director of OEX, I supervise staff in the office responsible for responding to the April 3 FOIA request. I make this Declaration in support of EPA's Opposition to Plaintiff's Motion for a FOIA Production Deadline.

**I. NRDC'S FOIA REQUEST AND EPA'S EFFORTS TO CLARIFY THE REQUEST**

3. *The April 3 FOIA request.* On April 3, 2017, EPA received a FOIA request from Plaintiff through FOIAonline, EPA's online FOIA tracking system, and assigned the FOIA request tracking number EPA-HQ-2017-005678. The FOIA request states as follows:

On March 29, 2017, Administrator Pruitt was interviewed by radio host Hugh Hewitt. In the interview the Administrator stated: "[O]ne of the things we've done internally, Hugh, is send a memo out to our regions and also to headquarters to say that the days of sue and settle, the days of consent decrees governing this agency whether the EPA gets sued by an NGO, a third party, and that third party, sets the agenda, sets the timelines on how we do rulemaking, and bypassing rulemaking entirely have ended. And we've sent that out across the agency."

Please produce records of the following types in EPA's possession, custody or control:

1. The memo or memos described by Administrator Pruitt in the statement quoted above.
2. All agency documents and communications related to the memo or memos described by Administrator Pruitt in the statement quoted above.
3. Any communications with outside parties, since January 20, 2017, regarding the subject matter of the memo or memos described by Administrator Pruitt in the statement quoted above.

*See Exhibit A, April 3 FOIA Request.* (The three items noted above are referred to herein as Parts 1, 2, and 3 of the April 3 FOIA request). Plaintiff did not request expedited processing of the April 3 FOIA request. The EPA National Freedom of Information Act Program assigned OEX as the lead action office for the April 3 FOIA request. On April 26, 2017, EPA granted NRDC's fee waiver request.

4. *NRDC's lawsuit.* NRDC filed the above-captioned matter on May 11, 2017. The case involves the April 3 FOIA request, as well as three other separate and unrelated FOIA requests, dated February 22, March 8, and April 10, 2017. Exhibit B. On July 17, 2017, the parties informed the Court that they agreed to the following dates for responding to all or parts of the four FOIA requests:

- a. *February 22 FOIA request:* October 31, 2017 (final response).
- b. *March 8 FOIA request:* August 31, later modified by Court order to September 19, 2017 (final response).
- c. *April 3 FOIA request:* July 24, 2017 (interim response addressing Part 1).
- d. *April 10 FOIA request:* August 31, later modified by Court order to September 19, 2017 (final response).

5. *EPA's responses to the four FOIA requests to date.* EPA provided an interim response to the March 8 and April 10 FOIA requests on June 28, 2017, and completed the two requests on September 19, 2017. On July 24, 2017, EPA provided an interim response to Part 1 of the April 3 FOIA request. Exhibit C. EPA's search and review of records responsive to the February 22 FOIA request are ongoing, and I understand the EPA plans to complete the request by October 31, 2017.

## II. THE PARTIES' ENGAGEMENT ON PARTS 2 AND 3 OF THE APRIL 3 FOIA REQUEST

6. As the parties negotiated a production schedule for the four FOIA requests in July 2017, EPA, through its counsel, explained to NRDC that Part 3 of the April 3 FOIA request was unclear because "outside parties" was an overly broad and undefined term. Through counsel, EPA sought further clarification of this term, and NRDC explained that the term was intended to mean any party outside the Executive Branch.

7. In its July 24, 2017 response to Part 1 of the April 3 FOIA request, EPA stated, "EPA determined that the 'memo' referenced in the March 29, 2017 interview was an oral directive; thus

there were no responsive records” to Part 1. *See* Exhibit C. In light of EPA’s no-records response to Part 1 of the request, NRDC sought to replace the word “memo” in Parts 2 and 3 of the April 3 FOIA request with the words “oral directive.” Through an email dated July 31, 2017, from its counsel, EPA noted that if NRDC seeks to change the scope of the FOIA to seek records on an “oral directive,” it should submit a new FOIA request. Plaintiff declined to do so. In the spirit of compromise and to move the matter forward, EPA treated NRDC’s July 31, 2017 email as a modification to the April 3 FOIA request.

8. EPA, through its counsel, then attempted to reach agreement with NRDC on the custodians, search terms, and time-frame for responding to Parts 2 and 3 of the April 3 FOIA request, as modified, in an effort to narrow the issues for litigation. From July 31 to August 25, 2017, EPA, through its counsel, provided plaintiff’s counsel with four proposals for potential search parameters to address the April 3 FOIA Request. Plaintiff rejected all four of these proposals.

9. In conjunction with each search proposal, EPA’s eDiscovery Division conducted a pre-case assessment of the proposed search parameters. The pre-case assessment is a process to determine an estimated volume of potentially responsive records and aid EPA in estimating the length of time it would take to conduct the collection, search, and processing of information. An eDiscovery pre-case assessment is a centralized assessment of all identified custodians’ Microsoft Outlook emails to determine the estimated number of records responsive to specific search parameters. The pre-case assessment does not conduct the actual search nor does it process the potentially responsive records into a reviewable platform. The search and processing of email records could take from several weeks to months, depending on the eDiscovery Division’s workload and the number of potentially responsive records.

### III. EPA'S REVIEW AND PRODUCTION SCHEDULE

10. *Number of potentially responsive records.* EPA performed a pre-case assessment of the search parameters outlined to NRDC on August 25, which generated 6,407 “hits,” or number of email “families” identified as a result of the search. A “hit” or “family” represents a single email and all of its attachments. Once attachments are extracted from families, the total number of potentially responsive records increases, likely two- to three-fold. Therefore, assuming a two- to three-fold increase, the pre-case assessment indicates 12,814 to 19,221 potentially responsive Outlook records.<sup>1</sup> Given the high volume of documents to search, collect, and process into a platform for review, EPA’s eDiscovery Services Division only recently completed its collection and processing of records into a reviewable format on October 11, 2017.

11. *Additional search of non-Outlook records.* In addition to the Outlook records, EPA estimates it will complete its search for and upload all responsive, non-Outlook records to the review platform by late November 2017. At this time, EPA does not have an estimate of the number of non-Outlook records that will need to be reviewed for responsiveness, and the production schedule proposed below is based on the assumption that there will not be a significant number of non-Outlook files requiring review. If significant numbers of responsive, non-Outlook records are identified, EPA may need to request an adjustment of its review and production schedule.

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<sup>1</sup> During the parties’ discussions, EPA, through counsel, estimate d there were more than 10,000 potentially responsive records resulting from the pre-case assessment tool. This estimate was based on preliminary results of the assessment and was predicated on use of a 2-times multiplier, which assumes that each document will only have one attachment. The 2-to-3 times multiplier, described in Paragraph 10, is the general rule of thumb used by the eDiscovery Division to generate the estimated range of potentially responsive documents in pre-case assessments.

12. EPA's proposed review schedule for the April 3 Request. Given the voluminous estimated number of documents to review and other demands, work is discussed below, EPA's estimate for completion of production on June 30, 2018. The following is EPA's proposed schedule for reviewing responsive documents and applicable FOIA exemption(s):

- a. November 2017: 250 - 500
- b. December 2017: 500 - 1500
- c. January 2018: 750 - 2000
- d. February 2018: 1500 - 3000
- e. March 2018: 1500 - 3000
- f. April 2018: 1500 - 3000
- g. May 2018: 1500 - 3000
- h. June 2018: 1500 - 3000

EPA will start producing reviewed, non-exempt records on December 1, 2017, with the first production being made in December 2017. EPA expects to complete production of records on a monthly basis thereafter.

13. The review schedule is based on the following factors, in which further detail below the Office of the Administrator has experienced increase in FOIA requests since Fiscal Year 2016; other deadlines, including those in this FOIA lawsuit; EPA's limited resources not only devoted to FOIA request but to numerous other FOIA requests received by the Office of the Administrator, including those

<sup>2</sup> This estimated completion deadline is later than what NRC has during the course of the parties' discussions for a number of reasons: (1) the estimate is based on the more up-to-date estimate of 12,814 to five, but it is potentially more than the lower, rough estimate of over 10,000 records; (2) EPA's personnel could have spent time working on reviewing documents to the FOIA requests at issue in this litigation have spent time in connection with responding to Plaintiff's motion; and (3) in completing its response EPA has comprehensively considered its backlog, expedited processing requests, and has now determined the earlier completion deadline was impractical and FOIA requesters, including expedited requesters.

granted expedited processing. The estimated number of documents to be reviewed each month is lower in November and December 2017 because of the time necessary for the non-Outlook documents to be processed and placed on the review platform; competing obligations of the reviewers to provide responses to NRDC's February 22 FOIA request by the October 31, 2017 deadline, and the time necessary for reviewers to transition to the new FOIA request; and expected employee absences at the holidays and use of "use of lose" leave.

14. I understand that NRDC, in filing its Motion for a FOIA Production Deadline, has sought a production deadline of November 17, 2017, for EPA to respond to the remaining parts of the April 3 FOIA request. Given the estimated volume of potentially responsive records (12,814 to 19,221) and the other workload of my office, as outlined below, OEX's limited staff is unable to complete its response by Plaintiff's proposed November 17, 2017 deadline.

15. *EPA resources dedicated to processing FOIA requests assigned to OEX (including the April 3 FOIA request).* OEX has three full-time staff to review all records potentially responsive to all FOIA requests assigned to the Office of the Administrator and to review records with Office of the Administrator equities that are responsive to requests assigned to other EPA offices.

16. *Workload of the OEX reviewers:* OEX is the lead office for the February 22 FOIA request. Work on the February 22 FOIA request is ongoing, and EPA must complete its production by October 31, 2017.

17. The OEX staff has experienced a very significant increase in FOIA requests.

a. *The Office of the Administrator has experienced a 415 percent increase in FOIA requests in Fiscal Year 2017, as compared to Fiscal Year 2016.* In Fiscal Year 2016, the Office of the Administrator received 203 FOIA requests. In Fiscal Year 2017, the Office of the

Administrator received 1,045 FOIA requests. The number of requests increased 415 percent, and the majority of those requests were submitted since January 2017.

b. *Currently Pending FOIA Requests Assigned to the Office of the Administrator.* The Office of the Administrator currently has 910 pending FOIA requests. OEX is responsible for overseeing the processing of the 910 FOIA requests assigned to the Office of the Administrator. In addition, OEX reviews records responsive to FOIA requests assigned to other EPA program and regional offices if they concern the Office of the Administrator's Immediate Office.

c. *Pending expedited processing requests in OEX.* The Office of the Administrator has 84 pending FOIA requests that were granted expedited processing. In granting the FOIA requests expedited processing, EPA determined the requesters had a compelling need, including a demonstration of either imminent threat to life or physical safety or an urgency to inform the public about an actual or alleged federal government activity. *See* 40 C.F.R. § 2.104(e). Plaintiff did not seek expedited processing for its April 3 FOIA request. Thus, EPA placed the 84 expedited processing requests ahead of NRDC's April 3 FOIA request in its processing queue.

d. If Plaintiff's April 3 FOIA request were to be processed in the ordinary course, it would be number 214 in the queue of 910 currently pending Office of the Administrator's FOIA requests. However, the processing schedule outlined in paragraph 12 above would effectively allow NRDC's April 3 FOIA request to be processed out of order — ahead of other FOIA requests that may have been received earlier but are not currently in litigation and concurrently with FOIA requests that have been granted expedited processing.



e. *Number of other FOIA lawsuits.* Records from the Administrator's Office are relevant to 16 pending FOIA lawsuits against EPA, two of which were filed by NRDC (this case and another pending the United States District Court for the District of Columbia). The same three full-time OEX employees assigned to respond to the Office of the Administrator's FOIA requests will need to dedicate time to reviewing records responsive to those 16 cases and work with counsel on the litigation.

18. *Other factors affecting EPA's completion date.*

a. *Number of FOIA requests from NRDC.* In Fiscal Year 2017, EPA received 41 FOIA requests from Plaintiff according to EPA's FOIAonline tracking system. Within this number, the Office of the Administrator alone must respond to 18 complex FOIA requests from NRDC, including the April 3 FOIA request at issue in this Motion.

b. *EPA's average time for responding to complex FOIA requests.* According to EPA's Annual 2016 FOIA Report, the average number of days it takes EPA headquarters offices to process complex-tracked FOIA requests is 267 working days. See EPA FOIA Annual Report (for 10/1/2015 through 9/30/2016), [https://www.epa.gov/sites/production/files/2017-01/documents/2016\\_foia\\_annual\\_report.pdf](https://www.epa.gov/sites/production/files/2017-01/documents/2016_foia_annual_report.pdf) at 8. Plaintiff's modified April 3 FOIA request is a complex-tracked FOIA request involving a voluminous amount of potentially responsive records and multiple EPA headquarters and regional offices.

19. *EPA's review process.* OEX staff and at least one attorney from the Office of General Counsel will conduct the first-level staff review of all potentially responsive records. Consistent with EPA's FOIA policy, during first-level review, at least two knowledgeable individuals review all documents and ensure the accuracy and consistency of the review. The modified April 3 FOIA request seeks documents that concern settlement and consent decrees of

ongoing litigation and developing policies. Given this scope, EPA reasonably expects the potentially responsive records to include attorney-client, attorney work product, and/or deliberative process privileged information. As such, and considering the collection of records from 42 custodians situated throughout the Agency, EPA may conduct a second-level review of these records that will require additional input or review from the Office of General Counsel, EPA Headquarters, or some of the 10 Regional Offices.

20. Based on the above, EPA believes that it can complete the April 3 FOIA request by June 2018, consistent with the review schedule set forth in Paragraph 12.

Pursuant to 28 U.S.C. § 1746, I hereby affirm under penalty of perjury that the forgoing declaration is true and correct.

Executed this 11 day of October 2017.



Brian Hope  
Deputy Director, Office of the Executive Secretariat  
Office of the Administrator  
U.S. Environmental Protection Agency

# EXHIBIT A

NATURAL RESOURCES DEFENSE COUNCIL

April 3, 2017

**Via FOIA Online**

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
(202) 566-1667

**Re: Freedom of Information Act Request for Records Regarding Agency Memoranda Announced by Administrator Pruitt that Establish Settlement and Consent Decree Policies**

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and applicable Environmental Protection Agency (EPA) regulations at 40 C.F.R. §§ 2.100-2.406.

**I. Description of Records Sought**

On March 29, 2017, Administrator Pruitt was interviewed by radio host Hugh Hewitt. In the interview, the Administrator stated: “[O]ne of the things we’ve done internally, Hugh, is send a memo out to our regions and also to headquarters to say that the days of sue and settle, the days of consent decrees governing this agency where the EPA gets sued by an NGO, a third party, and that third party sets the agenda, sets the timelines on how we do rulemaking, and bypassing rulemaking entirely have ended. And we’ve sent that out across the agency.”

Please produce records of the following types in EPA’s possession, custody or control:

1. The memo or memos described by Administrator Pruitt in the statement quoted above.
2. All agency documents and communications related to the memo or memos described by Administrator Pruitt in the statement quoted above.

3. Any communications with outside parties, since January 20, 2017, regarding the subject matter of the memo or memos described by Administrator Pruitt in the statement quoted above.

In this request, the term “records” means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, social media posts, text messages, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any EPA office, including, but not limited to, EPA Headquarters.

Note that this request specifically seeks responsive records in or on the personal computers, cellphones or other devices, or personal email accounts used by EPA staff if used for any government purpose.

## **II. Request for a Fee Waiver**

NRDC requests that EPA waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without charge “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1). The requested disclosure would meet both of these requirements.

### **A NRDC Satisfies the First Fee Waiver Requirement**

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors used by EPA to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 40 C.F.R. § 2.107(l)(2).

#### **1. Subject of the request**

The records requested here relate to government operations or activities. This request seeks information about federal agency memoranda that, as described, set final policy governing agency settlement, consent decrees, and rulemaking timelines. The requested records thus directly concern “the operations or activities of the government.” 40 C.F.R. § 2.107(l)(2)(i).

#### **2. Informative value of the information to be disclosed**

The requested records are “likely to contribute to” the public’s understanding of government operations and activities, 40 C.F.R. § 2.107(l)(2)(ii). The public does not currently possess the memos described by the Administrator in the interview, nor does the public have access to communications about those memos. There is more than a reasonable likelihood that these records have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006). EPA itself believes that the subject matter of these memos has informative value to the public, because the Administrator himself addressed it in a public radio interview. The memos themselves and any communications with outside parties about those memos have equal or greater informative value.

Disclosure of the requested records would meaningfully inform public understanding with respect to a topic of public interest. The records requested are not currently in the public domain.

**3. *Contribution to an understanding of the subject by the public is likely to result from disclosure.***

NRDC’s extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability and will to use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC’s more than one million members and online activists are “a reasonably broad audience of persons interested in the subject” of the memos described by Administrator Pruitt and agency communications about those memos and the underlying subject matter. 40 C.F.R. § 2.107(l)(2)(iii). When combined with NRDC’s communications to the public at large, the likely audience of interested persons to be reached is certainly “reasonably broad.” *Id.* As NRDC’s long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. These include, but are not limited to the following:

- NRDC's website, available at <http://www.nrdc.org>, is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
- NRDC's Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions>.
- *NRDC This Week* is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at <http://www.nrdc.org/newsletter>.
- NRDC updates and maintains several social media accounts: Facebook (565,530 followers), Twitter (195,426 followers), Instagram (37,868 followers), YouTube (19,518 subscribers), and LinkedIn (9,108 followers). We also use Medium as another distribution channel for our content (1,478 followers).

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*, narrated by Rachel McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters and editorial writers; distributes content on Huffington Post; and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Research article, "The requirement to rebuild US fish stocks: Is it working?" *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell);
- Issue brief, "The Untapped Potential of California's Water Supply: (1) *FLUQ* (2) *5-KVH* (3) *DQG* (4) *6-WUPZWHU* (5) *μ* (6) *-XG* authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann); see also "Saving Water in California," *N.Y. Times*, July 9, 2014 (discussing the report's estimates);
- Article, "Waves of phony charges over new clean water safeguards," *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner);

- Article, “Don’t Buy the Smear of the EPA,” *L.A. Times*, June 3, 2014 (by NRDC President Frances Beinecke);
- Transcript, “Conservationists Call For Quiet: The Ocean Is Too Loud!” Nat’l Pub. Radio, *All Things Considered*, July 28, 2013 (featuring NRDC Marine Mammal Protection Program Director Michael Jasny);
- Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012;
- Article, “Is there a ‘proper level’ of compliance with environmental law?” *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall);
- NRDC Document Bank, <http://docs.nrdc.org/>.

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are “generally recognized as safe”. *See also* Kimberly Kindy, “Are secret, dangerous ingredients in your food?” *Wash. Post*, Apr. 7, 2014 (discussing NRDC’s report).
- (2) NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. In January 2014, NRDC published a report, titled *Playing Chicken with Antibiotics*, which is based on the documents obtained, and reveals decades of hesitancy on FDA’s part to ensure the safety of these drug additives. *See also* P.J. Huffstutter and Brian Grow, “Drug critic slams FDA over antibiotic oversight in meat production,” *Reuters*, Jan. 27, 2014 (discussing NRDC’s report).
- (3) NRDC has used White House documents obtained through FOIA and from other sources to inform the public about EPA’s decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. *See Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*,



<http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (Apr. 2010) (update to 2009 report); *see also* William Souder, “It’s Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?” *Harper’s Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC).

- (4) NRDC incorporated information obtained through FOIA into a report, available at <http://www.nrdc.org/wildlife/marine/sound/contents.asp>, on the impacts of military sonar and other industrial noise pollution on marine life. *See Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report). The report also relied upon and synthesized information from other sources. Since the report’s publication, the sonar issue has continued to attract widespread public attention. *See, e.g.*, “Protest Raised over New Tests of Naval Sonar,” Nat’l Pub. Radio, *All Things Considered*, July 24, 2007.
- (5) NRDC scientists have used information obtained through FOIA to publish analyses of the United States’ and other nations’ nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States’ plans to deploy a ballistic missile system and the implications for global security. *See* Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, “The Protection Paradox,” *Bulletin of Atomic Scientists*, Mar./Apr. 2004.
- (6) NRDC obtained through FOIA, and made public, records of the operations of the Bush administration’s Energy Task Force, along with analysis of selected excerpts and links to the administration’s index of withheld documents. NRDC’s efforts cast light on an issue of considerable public interest. *See, e.g.*, Elizabeth Shogren, “Bush Gets One-Two Punch on Energy,” *L.A. Times*, Mar. 28, 2002, at A22.
- (7) Through FOIA, NRDC obtained a memorandum by ExxonMobil, advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration’s decision to replace Dr. Robert Watson. *See* NRDC Press Release and attached Exxon memorandum, “Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel,” Apr. 3, 2002; Elizabeth Shogren, “Charges Fly Over Science Panel Pick,” *L.A. Times*, Apr. 4, 2002, at A19.

- (8) Through FOIA and other sources, NRDC obtained information on nationwide levels of arsenic in drinking water and used it in a report, *Arsenic and Old Laws* (2000), available in print and online at <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp>. The report guided interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; see also Steve LaRue, “EPA Aims to Cut Levels of Arsenic in Well Water,” *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report).

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public’s understanding of the subject.

#### **4. *Significance of the contribution to public understanding***

The records requested shed light on matters of considerable public interest and concern: EPA policy governing settlement, consent decrees, and rulemaking timelines. Disclosure would also help the public understand the nature and extent of any communications with outside parties about the memos described by Administrator Pruitt. And disclosure would help the public to better understand and evaluate the basis for the Administrator’s public statements.

Public understanding of these topics would be significantly enhanced by disclosure of the requested records.

### **B NRDC Satisfies the Second Fee Waiver Requirement**

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1), (3). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Env’tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the subject of this request. As noted above, work done by EPA on this topic relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the underlying subject matter.

### III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with EPA's FOIA regulations at 40 C.F.R. § 2.107(c)(1)(iv) for all or a portion of the requested records. *See* 40 C.F.R. § 2.107(l)(4). Please contact me before doing anything that would cause the fee to exceed \$250. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

### IV. Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA's has already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104 (describing response deadlines). Specifically, please immediately produce the memo(s) requested by item number 1 under section I above. If EPA concludes that any of the records requested here are publicly available, please let me know.

Please do not hesitate to call or email with questions. Thank you.

Sincerely,

/s/ Aaron Colangelo

Aaron Colangelo  
Natural Resources Defense Council  
1152 15th Street NW Suite 300  
Washington DC 20005  
202-289-2376

# EXHIBIT B

NATURAL RESOURCES DEFENSE COUNCIL

February 22, 2017

**Via FOIA Online and Certified Mail, Return Receipt Requested**

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
(202) 566-1667

**Re: Freedom of Information Act Request for Records Regarding EPA  
Press Release Announcing “Scott Pruitt’s Ascension to EPA  
Administrator”**

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and applicable Environmental Protection Agency (EPA) regulations at 40 C.F.R. §§ 2.100-2.406.

**I. Description of Records Sought**

Please produce records of the following types in EPA’s possession, custody or control:

1. All agency documents and communications related to the content, timing, preparation, and dissemination of the EPA News Release dated February 17, 2017 and titled “Job Creators, American Energy Producers, Farmers and Elected Officials Cheer Scott Pruitt’s Ascension to EPA Administrator,” a copy of which is attached to this FOIA request as Exhibit A (and which is referred to in this FOIA request as the “Ascension Press Release.”)
2. All drafts of the Ascension Press Release and comments on drafts of the Ascension Press Release.
3. All communications with outside parties regarding the statements contained in the Ascension Press Release, including but not limited to communications with the following individuals and entities, and any representatives or staff of the following individuals and entities:
  - a. U.S. Representative David McKinley
  - b. American Farm Bureau Federation

- c. U.S. Senator Shelley Moore Capito
- d. U.S. Senator Pat Roberts
- e. Longview Power
- f. Auto Alliance
- g. American Coalition for Clean Coal Electricity
- h. Jay Ashcroft, Missouri Secretary of State
- i. National Association of Manufacturers
- j. National Mining Association
- k. National Pork Producers Council
- l. U.S. Representative Paul Gosar
- m. U.S. Representative Markwayne Mullin
- n. U.S. Representative Randy Weber
- o. U.S. Representative Jim Bridenstine
- p. National Cattlemen's Beef Association
- q. National Association of Home Builders

In this request, the term "records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, social media posts, text messages, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any EPA office, including, but not limited to, EPA Headquarters.

Note that this request specifically seeks responsive records in or on the personal computers, cellphones or other devices, or personal email accounts used by EPA staff if used for any government purpose.

## **II. Request for a Fee Waiver**

NRDC requests that EPA waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without charge "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1). The requested disclosure would meet both of these requirements.

### **A. NRDC Satisfies the First Fee Waiver Requirement**

The disclosure requested here would be "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors used by EPA to

evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. See 40 C.F.R. § 2.107(l)(2).

**1. Subject of the request**

The records requested here relate to the EPA Office of the Administrator's press statement regarding the "ascension" of Scott Pruitt to EPA Administrator. This request seeks information about EPA's preparation of that press statement, including about the content, timing, and dissemination of the statement, and communications with outside parties about the statement. The requested records thus directly concern "the operations or activities of the government." 40 C.F.R. § 2.107(l)(2)(i).

**2. Informative value of the information to be disclosed**

The requested records are "likely to contribute to" the public's understanding of government operations and activities, 40 C.F.R. § 2.107(l)(2)(ii). The public does not currently possess any information regarding EPA's preparation or dissemination of the Ascension Press Release, including communications with outside parties about that release. There is more than a reasonable likelihood that these records have informative value to the public, *see Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006). EPA itself believes that the press statement has informative value, having posted it on the agency's website and disseminated it widely. Information about the preparation of the press statement and communications with outside parties about the press statement has equal or greater informative value.

It is unusual that a federal agency would endorse and widely disseminate statements referring to itself as "tone deaf"; a "rogue" agency; "one of the most vilified agencies in the 'swamp' of overreaching government"; and a "runaway bureaucracy largely out of touch with how its policies directly affect folks like cattle ranchers," as the Ascension Press Release does. Disclosure of the requested records would meaningfully inform public understanding with respect to a topic of public interest. The records requested are not currently in the public domain.

**3. Contribution to an understanding of the subject by the public is likely to result from disclosure.**

NRDC's extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability and will to use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See*

*Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than one million members and online activists are "a broad audience of persons interested in the subject" of EPA communications with legislators and regulated industries about the agency's mission and effectiveness, and the EPA Administrator's office apparent denigration of the agency itself as tone deaf, vilified, overreaching, and out of touch. 40 C.F.R. § 2.107(l)(2)(iii). When combined with NRDC's communications to the public at large, the likely audience of interested persons to be reached is certainly "reasonably broad." 40 C.F.R. § 2.107(l)(2)(iii). As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. These include, but are not limited to the following:

- x NRDC's website, available at <http://www.nrdc.org>, is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
- x NRDC's Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions>.
- x *NRDC This Week* is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at <http://www.nrdc.org/newsletter>.
- x NRDC updates and maintains several social media accounts: Facebook (565,530 followers), Twitter (195,426 followers), Instagram (37,868 followers), YouTube (19,518 subscribers), and LinkedIn (9,108 followers). We also use Medium as another distribution channel for our content (1,478 followers).

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*, narrated by Rachel



McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters and editorial writers; distributes content on Huffington Post; and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- x Research article, "The requirement to rebuild US fish stocks: Is it working?" *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell);
- x Issue brief, "The Untapped Potential of California's Water Supply: (I 2 FLHQ\0 L 5XMH0 L DQG 6WRUPDWU0 μ L -XG authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann); see also "Saving Water in California," *N.Y. Times*, July 9, 2014 (discussing the report's estimates);
- x Article, "Waves of phony charges over new clean water safeguards," *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner);
- x Article, "Don't Buy the Smear of the EPA," *L.A. Times*, June 3, 2014 (by NRDC President Frances Beinecke);
- x Transcript, "Conservationists Call For Quiet: The Ocean Is Too Loud!" Nat'l Pub. Radio, *All Things Considered*, July 28, 2013 (featuring NRDC Marine Mammal Protection Program Director Michael Jasny);
- x Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012;
- x Article, "Is there a 'proper level' of compliance with environmental law?" *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall);
- x NRDC Document Bank, <http://docs.nrdc.org/>.

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency

about several chemicals used as ingredients in food that manufacturers claim are “generally recognized as safe”. See also Kimberly Kindy, “Are secret, dangerous ingredients in your food?” *Wash. Post*, Apr. 7, 2014 (discussing NRDC’s report).

- (2) NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. In January 2014, NRDC published a report, titled *Playing Chicken with Antibiotics*, which is based on the documents obtained, and reveals decades of hesitancy on FDA’s part to ensure the safety of these drug additives. See also P.J. Huffstutter and Brian Grow, “Drug critic slams FDA over antibiotic oversight in meat production,” *Reuters*, Jan. 27, 2014 (discussing NRDC’s report).
- (3) NRDC has used White House documents obtained through FOIA and from other sources to inform the public about EPA’s decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. See *Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (Apr. 2010) (update to 2009 report); see also William Souder, “It’s Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?” *Harper’s Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC).
- (4) NRDC incorporated information obtained through FOIA into a report, available at <http://www.nrdc.org/wildlife/marine/sound/contents.asp>, on the impacts of military sonar and other industrial noise pollution on marine life. See *Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report). The report also relied upon and synthesized information from other sources. Since the report’s publication, the sonar issue has continued to attract widespread public attention. See, e.g., “Protest Raised over New Tests of Naval Sonar,” Nat’l Pub. Radio, *All Things Considered*, July 24, 2007.
- (5) NRDC scientists have used information obtained through FOIA to publish analyses of the United States’ and other nations’ nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States’ plans to deploy a ballistic missile system and the implications for global security. See Hans M. Kristensen, Matthew G.

McKinzie, and Robert S. Norris, "The Protection Paradox," *Bulletin of Atomic Scientists*, Mar./Apr. 2004.

- (6) NRDC obtained through FOIA, and made public, records of the operations of the Bush administration's Energy Task Force, along with analysis of selected excerpts and links to the administration's index of withheld documents. NRDC's efforts cast light on an issue of considerable public interest. See, e.g., Elizabeth Shogren, "Bush Gets One-Two Punch on Energy," *L.A. Times*, Mar. 28, 2002, at A22.
- (7) Through FOIA, NRDC obtained a memorandum by ExxonMobil, advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration's decision to replace Dr. Robert Watson. See NRDC Press Release and attached Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," Apr. 3, 2002; Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times*, Apr. 4, 2002, at A19.
- (8) Through FOIA and other sources, NRDC obtained information on nationwide levels of arsenic in drinking water and used it in a report, *Arsenic and Old Laws* (2000), available in print and online at <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp>. The report guided interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; see also Steve LaRue, "EPA Aims to Cut Levels of Arsenic in Well Water," *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report).

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public's understanding of the subject.

#### **4. Significance of the contribution to public understanding**

The records requested shed light on matters of considerable public interest and concern: the credibility of the EPA Administrator's office and the EPA Administrator's ability and willingness to carry out the agency's environmental and public health responsibilities, which are clearly implicated by the Administrator's office's denigration of the agency as tone deaf, vilified, overreaching, and out of touch.

Disclosure would also help the public understand the nature and extent of communications with outside parties about the Ascension Press Release. And disclosure would help the public to better understand and evaluate the basis for the Administrator's office's willingness or eagerness to describe the agency in starkly disparaging terms.

Public understanding of these topics would be significantly enhanced by disclosure of the requested records.

## **B. NRDC Satisfies the Second Fee Waiver Requirement**

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1), (3). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Env'tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the subject of this request. As noted above, work done by EPA on this topic relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the underlying subject matter.

## **III. Willingness to Pay Fees Under Protest**

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with EPA's FOIA regulations at 40 C.F.R. § 2.107(c)(1)(iv) for all or a portion of the requested records. See 40 C.F.R. § 2.107(l)(4). Please contact me before doing anything that would cause the fee to exceed \$250. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

## **IV. Conclusion**

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA's has already retrieved and elected to produce. See *generally* 40 C.F.R. § 2.104 (describing response deadlines). If EPA concludes that any of the records requested here are publicly available, please let me know.

Please do not hesitate to call or email with questions. Thank you.

Sincerely,

/s/ Aaron Colangelo

Aaron Colangelo  
Natural Resources Defense Council  
1152 15th Street NW Suite 300  
Washington DC 20005  
202-289-2376

NATURAL RESOURCES DEFENSE COUNCIL

March 8, 2017

**Via FOIA Online and Certified Mail, Return Receipt Requested**

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
(202) 566-1667

**Re: Freedom of Information Act Request for Records Regarding EPA  
Administrator's Role in Clean Water Rule Litigation**

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and applicable Environmental Protection Agency (EPA) regulations at 40 C.F.R. §§ 2.100-2.406.

**I. Description of Records Sought**

This request seeks records that disclose Administrator Scott Pruitt's involvement, if any, in discussions about or the development of the two legal pleadings attached to this request. The first pleading seeks to hold the briefing schedule in abeyance in the U.S. Supreme Court case titled *National Association of Manufacturers v. Department of Defense*, No. 16-299. The second pleading, filed in the case titled *In re: United States Environmental Protection Agency & United States Department of Defense, Final Rule: Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015), No. 15-3751, notifies the U.S. Court of Appeals for the Sixth Circuit about an Executive Order and about "a Federal Register notice announcing [EPA and the Army Corps of Engineers'] intent to review and propose to rescind or revise the Clean Water Rule, in accordance with the Executive Order."

Please produce records of the following types in EPA's possession, custody or control:

1. Any records indicating whether Administrator Pruitt had any role in discussing or developing these pleadings;
2. Any records referring to or evidencing Administrator Pruitt's role in discussing or developing these pleadings;

3. Any records indicating whether Administrator Pruitt sought a waiver from EPA's ethics officer to participate in discussions of, or the development of, these pleadings;
4. Any records referring to the result of any such waiver request; and
5. Any records indicating the steps, if any, EPA took to shield Administrator Pruitt from involvement in discussions about or preparation of these pleadings.

In this request, the term "records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, social media posts, text messages, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any EPA office, including, but not limited to, EPA Headquarters.

Note that this request specifically seeks responsive records in or on the personal computers, cellphones or other devices, or personal email accounts used by EPA staff if used for any government purpose.

## **II. Request for a Fee Waiver**

NRDC requests that EPA waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without charge "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1). The requested disclosure would meet both of these requirements.

### **A. NRDC Satisfies the First Fee Waiver Requirement**

The disclosure requested here would be "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors used by EPA to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 40 C.F.R. § 2.107(l)(2).

#### **1. Subject of the request**

The records requested here relate to whether EPA Administrator Scott Pruitt took part in discussions about, or the development of, legal pleadings filed on behalf of the United States in federal courts. The requested records thus directly concern "the operations or activities of the government." 40 C.F.R. § 2.107(l)(2)(i).

## **2. *Informative value of the information to be disclosed***

The requested records are “likely to contribute to” the public’s understanding of government operations and activities, 40 C.F.R. § 2.107(l)(2)(ii). The public does not currently possess any information regarding Administrator Pruitt’s involvement with the litigation about the Clean Water Rule since he became Administrator.

There is more than a reasonable likelihood that these records have informative value to the public, *see Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006), as Administrator Pruitt’s prior litigation against EPA was a focus of much of the coverage of his nomination. *See, e.g.,* Brady Dennis, “Scott Pruitt, longtime adversary of EPA, confirmed to lead the agency,” *Washington Post* (Feb. 17, 2017); Coral Davenport, “Senate Confirms Scott Pruitt as E.P.A. Head,” *New York Times* (Feb. 17, 2017). Likewise, how former Oklahoma Attorney General and now EPA Administrator Pruitt would handle his involvement in litigation – like the cases that are the subject of this request – in which Oklahoma is a party opposing EPA was the subject of significant interest in the Senate and from public interest groups. *See, e.g.,* Letter from Senator Edward Markey et al. to Attorney General Scott Pruitt (Feb. 16, 2017), available at

<http://www.markey.senate.gov/imo/media/doc/Pruitt%20recusal%20letter%2002.16.17.pdf> (visited Mar. 7, 2017); Letter from Noah Bookbinder, Executive Director, Citizens for Responsibility & Ethics in Washington, to Kevin Minoli, Principal Deputy General Counsel & Designated Agency Ethics Officer, U.S. EPA (Jan. 17, 2017), available at <http://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/01/17183250/Letter-to-EPA-ethics-counsel-re-Pruitt-FINAL.pdf> (visited Mar. 7, 2017).

Disclosure of the requested records would meaningfully inform public understanding with respect to a topic of public interest. The records requested are not currently in the public domain.

## **3. *Contribution to an understanding of the subject by the public is likely to result from disclosure.***

NRDC’s extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability and will to use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated



viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than one million members and online activists are "a reasonably broad audience of persons interested in the subject" of the Clean Water Rule, of Administrator Pruitt and his successive roles as an opponent of and then leader of EPA, and of his role in litigation against the agency. 40 C.F.R. § 2.107(l)(2)(iii). When combined with NRDC's communications to the public at large, the likely audience of interested persons to be reached is certainly "reasonably broad." 40 C.F.R. § 2.107(l)(2)(iii). As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. These include, but are not limited to the following:

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- x NRDC's Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions>.
- x *NRDC This Week* is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at <http://www.nrdc.org/newsletter>.
- x NRDC updates and maintains several social media accounts: Facebook (565,530 followers), Twitter (195,426 followers), Instagram (37,868 followers), YouTube (19,518 subscribers), and LinkedIn (9,108 followers). We also use Medium as another distribution channel for our content (1,478 followers).

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content on Huffington Post; and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

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- x Issue brief, "The Untapped Potential of California's Water Supply: (I 2 FLHQ\0 L 5MH0 L DQ L 6RUPZWHU0 μ L -XG authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann); see also "Saving Water in California," *N.Y. Times*, July 9, 2014 (discussing the report's estimates);
- x Article, "Waves of phony charges over new clean water safeguards," *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner);
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NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are "generally recognized as safe". See also

Kimberly Kindy, "Are secret, dangerous ingredients in your food?" *Wash. Post*, Apr. 7, 2014 (discussing NRDC's report).

- (2) NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. In January 2014, NRDC published a report, titled *Playing Chicken with Antibiotics*, which is based on the documents obtained, and reveals decades of hesitancy on FDA's part to ensure the safety of these drug additives. See also P.J. Huffstutter and Brian Grow, "Drug critic slams FDA over antibiotic oversight in meat production," *Reuters*, Jan. 27, 2014 (discussing NRDC's report).
- (3) NRDC has used White House documents obtained through FOIA and from other sources to inform the public about EPA's decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. See *Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (Apr. 2010) (update to 2009 report); see also William Souder, "It's Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?" *Harper's Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC).
- (4) NRDC incorporated information obtained through FOIA into a report, available at <http://www.nrdc.org/wildlife/marine/sound/contents.asp>, on the impacts of military sonar and other industrial noise pollution on marine life. See *Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report). The report also relied upon and synthesized information from other sources. Since the report's publication, the sonar issue has continued to attract widespread public attention. See, e.g., "Protest Raised over New Tests of Naval Sonar," Nat'l Pub. Radio, *All Things Considered*, July 24, 2007.
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- (6) NRDC obtained through FOIA, and made public, records of the operations of the Bush administration's Energy Task Force, along with analysis of selected excerpts and links to the administration's index of withheld documents. NRDC's efforts cast light on an issue of considerable public interest. See, e.g., Elizabeth Shogren, "Bush Gets One-Two Punch on Energy," *L.A. Times*, Mar. 28, 2002, at A22.
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As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public's understanding of the subject.

#### **4. Significance of the contribution to public understanding**

The records requested are critical to understanding matters of considerable public interest and concern: the EPA Administrator's role in pending litigation involving his prior client, the State of Oklahoma, and the agency he now leads.

Disclosure would also help the public understand whether and to what extent Administrator Pruitt is pursuing an active role in such litigation and/or whether he has been effectively shielded from these cases by the agency.

Public understanding of these topics would be significantly enhanced by disclosure of the requested records.

## B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1), (3). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Env’tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the subject of this request. As noted above, work done by EPA on this topic relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the underlying subject matter.

## III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with EPA’s FOIA regulations at 40 C.F.R. § 2.107(c)(1)(iv) for all or a portion of the requested records. See 40 C.F.R. § 2.107(l)(4). Please contact me before doing anything that would cause the fee to exceed \$250. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

## IV. Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; EPA’s search for—or deliberations concerning—certain records should not delay the production of others that EPA’s has already retrieved and elected to produce. See *generally* 40 C.F.R. § 2.104 (describing response deadlines). If EPA concludes that any of the records requested here are publicly available, please let me know.

Please do not hesitate to call or email with questions. Thank you.

Sincerely,  
/s/ Jon Devine  
 Jon Devine  
 Natural Resources Defense Council  
 1152 15th Street NW Suite 300  
 Washington DC 20005  
 202-289-2361

NATURAL RESOURCES DEFENSE COUNCIL

April 10, 2017

**Via FOIA Online**

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
(202) 566-1667

**Re: Freedom of Information Act Request for Records of EPA  
Administrator's Role in Litigation in which Oklahoma is a Party**

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and applicable Environmental Protection Agency (EPA) regulations at 40 C.F.R. §§ 2.100-2.406.

**I. Description of Records Sought**

This request seeks records that illustrate Administrator Scott Pruitt's participation in, or recusal from, any litigation—or other particular matter involving specific parties—in which both EPA and the State of Oklahoma are parties. These cases include at least the following:

- x West Virginia v. EPA (D.C. Cir., filed Oct. 2015), lead case no. 15-1363
- x In re: DOD & EPA Final Rule: Clean Water Rule (6th Cir., filed July 2015), lead case no. 15-3751
- x National Ass'n of Manufacturers v. DOD, et al. (S. Ct., cert granted January 13, 2017), case no. 16-299
- x State of West Virginia, et al. v. EPA, et al. (D.C. Cir., filed July 2016), lead case no. 15-1381
- x State of North Dakota v. EPA (D.C. Cir., filed Nov. 2015), lead case no. 15-1381
- x American Petroleum Institute, et al. v. EPA (D.C. Cir., filed Aug. 2016), lead case no. 13-1108
- x State of Oklahoma ex rel. E. Scott Pruitt v. EPA, et al. (Northern Dist. OK, filed July 2015), on appeal *sub nom.* State of Oklahoma ex rel. Mike Hunter v. EPA, et al. (10th Cir.), lead case no. 16-5038

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- x Murray Energy Corporation v. EPA (D.C. Cir., filed June 2016), lead case no. 16-1127
- x Murray Energy Corporation v. EPA (D.C. Cir., filed Oct. 2015), lead case no. 15-1385
- x Walter Coke Inc. v. EPA (D.C. Cir., filed Aug. 2015), lead case no. 15-1166
- x State of Wyoming v. EPA, et al. (10th Cir., filed Jan. 2015), lead case no. 14-9512
- x Public Service Company of Oklahoma, d.b.a. AEP v. EPA (D.C. Cir., filed Feb. 2012), lead case no. 12-1023.

Please produce the following records that are in EPA's possession, custody or control:<sup>1</sup>

1. Any records indicating whether Administrator Pruitt has participated in any of these cases;
2. Any records indicating whether Administrator Pruitt sought a waiver from any agency ethics official to participate in any of these cases, and any records indicating whether the waiver was granted;
3. Any records indicating the steps, if any, EPA took to shield Administrator Pruitt from involvement in any of these cases; and
4. Any records indicating the names of EPA staff who have participated in any of these cases since January 20, 2017.

In this request, the term "records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, social media posts, text messages, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any EPA office, including, but not limited to, EPA Headquarters.

This request specifically seeks responsive records in or on the personal computers, cellphones or other devices, or personal email accounts used by EPA staff if used for any government purpose.

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<sup>1</sup> NRDC previously submitted a FOIA request for documents under tracking number EPA-HQ-2017-004617 on March 6, 2017. Though that request differed from this one in scope, to the extent any of the records requested here overlap with those provided under that tracking number, EPA need not provide those records a second time pursuant to this request. Please contact us with any questions relating to this potential overlap.

## II. Request for a Fee Waiver

NRDC requests that EPA waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without charge “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1). The requested disclosure would meet both of these requirements.

### A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors used by EPA to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 40 C.F.R. § 2.107(l)(2).

#### 1. Subject of the request

The records requested here relate to whether EPA Administrator Scott Pruitt is participating in ongoing litigation to which both EPA and Pruitt’s former client, Oklahoma, are parties, and who at EPA is directing or participating in the agency’s litigation decisions. The requested records thus directly concern “the operations or activities of the government.” 40 C.F.R. § 2.107(l)(2)(i).

#### 2. Informative value of the information to be disclosed

The requested records are “likely to contribute to” the public’s understanding of government operations and activities. 40 C.F.R. § 2.107(l)(2)(ii). The public does not currently possess any information regarding Administrator Pruitt’s participation in, or recusal from, pending litigation in which both the State of Oklahoma and EPA are parties. The public does not know who at EPA is directing or participating in EPA’s litigation decisions. The public does not know whether, in accordance with Pruitt’s ethics agreement and relevant ethics rules, he has been recused from such litigation or has been granted a waiver to participate. *See* Letter from E. Scott Pruitt to Kevin S. Minoli (Jan. 3, 2017),<sup>2</sup> and 5 C.F.R. § 2635.502.

There is more than a reasonable likelihood that these records have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006). Administrator Pruitt’s prior litigation against EPA was a focus of much of the

<sup>2</sup> [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/C3B4C444EB20D1FD852580C1002C7A75/\\$FILE/Pruitt,%20Edward%20Scott%20%20%20finalAMENDEDEA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/C3B4C444EB20D1FD852580C1002C7A75/$FILE/Pruitt,%20Edward%20Scott%20%20%20finalAMENDEDEA.pdf) (last visited April 5, 2017).



coverage of his nomination. See, e.g., Brady Dennis, “Scott Pruitt, longtime adversary of EPA, confirmed to lead the agency,” *Washington Post* (Feb. 17, 2017); Coral Davenport, “Senate Confirms Scott Pruitt as E.P.A. Head,” *New York Times* (Feb. 17, 2017). Likewise, how former Oklahoma Attorney General and now EPA Administrator Pruitt would handle his involvement in litigation – like the cases that are the subject of this request – in which Oklahoma is a party opposing EPA was the subject of significant interest from Senators and public interest groups. See, e.g., Letter from Senator Edward Markey et al. to Attorney General Scott Pruitt (Feb. 16, 2017), available at <http://www.markey.senate.gov/imo/media/doc/Pruitt%20recusal%20letter%2002.16.17.pdf> (visited Mar. 7, 2017); Letter from Senator Tom Carper et al. to Administrator Pruitt (March 21, 2017), available at [https://www.epw.senate.gov/public/\\_cache/files/0b1700be-0108-43bf-9dbd-558334de610a/carper-leads-call-for-pruitt-to-address-conflict-of-interest-in-clean-water-rule-review.pdf](https://www.epw.senate.gov/public/_cache/files/0b1700be-0108-43bf-9dbd-558334de610a/carper-leads-call-for-pruitt-to-address-conflict-of-interest-in-clean-water-rule-review.pdf) (visited April 5, 2017); Letter from Noah Bookbinder, Executive Director, Citizens for Responsibility & Ethics in Washington, to Kevin Minoli, Principal Deputy General Counsel & Designated Agency Ethics Officer, U.S. EPA (Jan. 17, 2017), available at <http://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/01/17183250/Letter-to-EPA-ethics-counsel-re-Pruitt-FINAL.pdf> (visited Mar. 7, 2017).

Disclosure of the requested records would meaningfully inform public understanding with respect to a topic of public interest. The records requested are not currently in the public domain.

**3. *Contribution to an understanding of the subject by the public is likely to result from disclosure.***

NRDC’s extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability and will to use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC’s more than one million members and online activists are “a broad audience of persons interested in

the subject” of Administrator Pruitt and his successive roles as an opponent and leader of EPA, and specifically his role in litigation that was brought by his former client against the agency. 40 C.F.R. § 2.107(l)(2)(iii). When combined with NRDC’s communications to the public at large, the likely audience of interested persons to be reached is certainly “reasonably broad.” 40 C.F.R. § 2.107(l)(2)(iii). As NRDC’s long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. These include, but are not limited to the following:

- x NRDC’s website, available at <http://www.nrdc.org>, is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
- x NRDC’s Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. This information is also made available through NRDC’s online Action Center at <https://www.nrdc.org/actions>.
- x *NRDC This Week* is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at <http://www.nrdc.org/newsletter>.
- x NRDC updates and maintains several social media accounts: Facebook (565,530 followers), Twitter (195,426 followers), Instagram (37,868 followers), YouTube (19,518 subscribers), and LinkedIn (9,108 followers). We also use Medium as another distribution channel for our content (1,478 followers).

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*, narrated by Rachel McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters and editorial writers; distributes content on Huffington Post; and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- x Research article, "The requirement to rebuild US fish stocks: Is it working?" *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell);
- x Issue brief, "The Untapped Potential of California's Water Supply: Efficiency, Reuse, and Stormwater," June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann); see also "Saving Water in California," *N.Y. Times*, July 9, 2014 (discussing the report's estimates);
- x Article, "Waves of phony charges over new clean water safeguards," *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner);
- x Article, "Don't Buy the Smear of the EPA," *L.A. Times*, June 3, 2014 (by NRDC President Frances Beinecke);
- x Transcript, "Conservationists Call For Quiet: The Ocean Is Too Loud!" Nat'l Pub. Radio, *All Things Considered*, July 28, 2013 (featuring NRDC Marine Mammal Protection Program Director Michael Jasny);
- x Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012;
- x Article, "Is there a 'proper level' of compliance with environmental law?" *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall);
- x NRDC Document Bank, <http://docs.nrdc.org/>.

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are "generally recognized as safe". See also Kimberly Kindy, "Are secret, dangerous ingredients in your food?" *Wash. Post*, Apr. 7, 2014 (discussing NRDC's report).
- (2) NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. In January 2014, NRDC published a report, titled *Playing Chicken with Antibiotics*, which is based on the documents obtained, and reveals decades of hesitancy on FDA's part to ensure the safety of

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- (7) Through FOIA, NRDC obtained a memorandum by ExxonMobil, advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration's decision to replace Dr. Robert Watson. See NRDC Press Release and attached Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," Apr. 3, 2002; Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times*, Apr. 4, 2002, at A19.
- (8) Through FOIA and other sources, NRDC obtained information on nationwide levels of arsenic in drinking water and used it in a report, *Arsenic and Old Laws* (2000), available in print and online at <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp>. The report guided interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; see also Steve LaRue, "EPA Aims to Cut Levels of Arsenic in Well Water," *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report).

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public's understanding of the subject.

#### **4. Significance of the contribution to public understanding**

The requested records are critical to understanding matters of considerable public interest and concern: the EPA Administrator's role in pending litigation in which his former client, the State of Oklahoma, is adverse to the agency he now leads; who at EPA is participating in such litigation on behalf of the agency; and whether Administrator Pruitt has been effectively shielded from these cases pursuant to governing ethics regulations and his ethics commitments. The requested records will shed significant light on these issues.

#### **B. NRDC Satisfies the Second Fee Waiver Requirement**

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1), (3). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res.*

*Def. Council v. United States Env'tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the subject of this request. As noted above, the subject of this request is a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the underlying subject matter.

### III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with EPA's FOIA regulations at 40 C.F.R. § 2.107(c)(1)(iv) for all or a portion of the requested records. See 40 C.F.R. § 2.107(l)(4). **But please contact me before doing anything that would cause the fee to exceed \$250.** NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

### IV. Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA has already retrieved and elected to produce. See *generally* 40 C.F.R. § 2.104 (describing response deadlines).

If EPA concludes that any of the records requested here are publicly available, please let me know.

Please do not hesitate to call or email with questions. Thank you.

Sincerely,

Catherine Rahm

Natural Resources Defense Council  
40 West 20th Street  
New York, NY 10011  
[crahm@nrdc.org](mailto:crahm@nrdc.org)  
(212) 727-4628

# EXHIBIT C



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

July 24, 2017

OFFICE OF THE  
EXECUTIVE SECRETARIAT

Mr. Aaron Colangelo  
Natural Resources Defense Council  
1152 15th Street NW, Suite 300  
Washington, DC 20005

RE: Freedom of Information Act Request EPA-HQ-2017-005678

Dear Mr. Colangelo:

This letter is a partial response to your April 3, 2017 Freedom of Information Act (FOIA) request regarding the March 29, 2017 interview between Environmental Protection Agency (EPA) Administrator Scott Pruitt and radio host Hugh Hewitt.

According to your request Administrator Pruitt stated that, "one of the things we've done . . . is send a memo to our regions and also to headquarters to say that the days of sue and settle . . . and bypassing rulemaking entirely have ended." Your request went on to seek:

1. The memo or memos described by Administrator Pruitt in the statement quoted above.
2. All agency documents and communications related to the memo or memos described by Administrator Pruitt in the statement quoted above.
3. Any communications with outside parties, since January 20, 2017, regarding the subject matter of the memo or memos described by Administrator Pruitt in the statement quoted above.

As you know, this FOIA request is currently in litigation; nonetheless, you requested through counsel that the EPA provide a response to Part 1. With respect to Part 1 the EPA determined that the "memo" referenced in the March 29, 2017 interview was an oral directive; thus, there are no responsive records.



If you have any further questions, please contact Assistant U.S. Attorney Dominika Tarczynska at 212-637-2748.

Sincerely,

*Jonathan Newton*

Jonathan Newton

cc: Quoc Nguyen, Office of General Counsel